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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 866

LYLE E. HERNANDEZ, et al.,

versus

ETHYL CORPORATION

and

PAUL B. PORTER, et al.,

versus

ETHYL CORPORATION, et al.,

CONSOLIDATED

Petition for a Writ of Certiorari to the Court of Appeal, First Circuit, of the State of Louisiana

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal, First Circuit, of the State of Louisiana, entered in the above entitled consolidated cases on October 6, 1955.

OPINIONS BELOW

The opinion of the Court of original jurisdiction, namely the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana (*infra*, Appendix A, pp. 43-48) is not reported.

The opinion of the Court of Appeal, First Circuit, of the State of Louisiana (*infra*, Appendix A, pp. 22-43) is reported at 83 So.2d 150.

The opinion of the Supreme Court of Louisiana denying jurisdiction and transferring the cases for final appellate determination to the Court of Appeal, First Circuit (*infra*, Appendix A, pp. 48-50) is reported at 224 La. 470, 70 So.2d 92.

JURISDICTION

The judgment of the Court of Appeal, First Circuit, of the State of Louisiana was pronounced on October 6, 1955, and a petition for rehearing was denied on November 22, 1955. Applications for writs of certiorari or review to the Supreme Court of the State of Louisiana were denied on January 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3).

Article VII, Section 29, of the Constitution of the State of Louisiana provides: "The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout the State, have

exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, and all appeals shall be both upon the law and the facts."

Article VII, Section 10, Paragraph 3, of the Constitution of the State of Louisiana provides: "The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows: . . . . Par. 3. Appellate jurisdiction; civil; exceptions. It shall have appellate jurisdiction in civil suits where the amount in dispute, or the fund to be distributed, irrespective of the amount therein claimed, shall exceed two thousand dollars exclusive of interest, except in suits for damages for physical injuries to, or for the death of a person, or for other damages sustained by such person or his heirs or legal representatives, arising out of the same circumstances; nor shall such appellate jurisdiction extend to any suit for compensation under any State or Federal Workmen's compensation law, or employer's liability act; provided, that appeals properly granted to the Supreme Court, in such excepted cases prior to the adoption of this Constitution, shall be finally disposed of by said court."

From the judgment of the court of original jurisdiction in these cases, namely the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, a consolidated appeal was taken to the Supreme Court of Louisiana. By a decision reported at 224 La. 470, 70 So.2d 92, the Supreme Court of Louisiana held that it did not have appellate jurisdiction in these cases as the claim of no individual plaintiff exceeded the sum of two thousand dollars as

required by Article VII, Sec. 10(3) of the Louisiana Constitution. Pursuant to Act No. 19 of 1912 of the Louisiana Legislature, L.S.A.-R.S. 13:4441, the Supreme Court of Louisiana transferred the consolidated appeals to the Court of Appeal, First Circuit, of the State of Louisiana, for final appellate determination.

To exhaust all state remedies, petitioners applied to the Louisiana Supreme Court for writs of certiorari and review of the judgment rendered by the Court of Appeal, First Circuit, on October 6, 1955. The Supreme Court of Louisiana denied the application for writs on January 16, 1956, without rendering an opinion, the granting of such writs being discretionary with that Court under Article VII, Section 10 of the Louisiana Constitution. After the denial of application for these writs by the Supreme Court of Louisiana, petitioners have no further appellate remedy under the laws of the State of Louisiana.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3) (62 Stat. 929), which provides that this Court may review by writ of certiorari the final judgment of the highest court of a State in which a decision could be had upon rights specially claimed under a statute of the United States.

QUESTIONS PRESENTED

Whether, under the statutes of the United States Congress regulating minimum hours and wages of employees engaged in interstate commerce, an employee is entitled to compensation for time spent on his employer's premises dur-

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ing the course of his daily work schedule which his employer labels as a "free and uninterrupted lunch period" if

(i) The employee is required to remain on the premises during the lunch period either because of employer regulations or because of the nature and location of the premises and the work conducted thereon; or

(ii) The employee is subject to employer regulations and supervision during such period, including rules of personal conduct and regulations for eating only in designated areas with possibility of immediate recall to assigned duties; or

(iii) The lunch period is permitted at irregular and unscheduled times to suit the convenience of the employer during the regular and continued production of goods; or

(iv) The continued presence and availability of the employee on the employer's premises is conducive to or necessary for the continued and uninterrupted operation of the employer's manufacturing process during the permitted "lunch period."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix D, *infra*, pp. 57-59. They primarily consist of the Federal Fair Labor Standards Act of 1938 as amended, U.S.C. Title 29, Sec. 201, et seq., 29 U.S.C.A. 201 et seq.; and the Portal to Portal Act of 1947, U.S.C. Title 29, Secs. 251, et seq., 29 U.S.C.A. 251, et seq.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY OF THE CASE.

As stated in the opinion of the Court of Appeal, First Circuit, of the State of Louisiana, dated October 6, 1955 (*infra,* Appendix A, pp. 22-43, at p. 23), a number of the present petitioners filed a prior suit on November 13, 1945, known as the "Williamson suit" seeking compensation for change of clothes time. In that suit the plaintiffs sought recovery for wages under the Federal Fair Labor Standards Act of 1938 (29 U.S.C.A. 201, et seq.) for time spent in changing clothes before and after each working shift at the chemical plant of their employer. The suit was concluded by a compromise settlement, which was referred to and quoted from in the opinion of the Circuit Court of Appeal of Louisiana to which the present writ of certiorari is directed. Under that settlement the claimants were paid for time devoted to changing of clothes before and after each shift up to October 12, 1945. The employer entered into a written contract with the collective bargaining agent of the present petitioner-employees to pay for time consumed in changing clothes before and after each shift at the regular rate of pay.

In 1946 the present suits were instituted in the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana, within the territorial jurisdiction of which the plaintiffs were employed, to recover wages for one-half hour per day of a five day week for preliminary and postliminary activities (changing of clothes) pursuant to the written contract with the employer providing for compensation thereof, recovery being sought at the statutory rate of one and one-half times the regular rate of pay (29 U.S.C.A.

207(a).) plus the liquidated damages and attorney fees provided for by statute (29 U.S.C.A. 216(b).). A number of exceptions and special pleas were filed by the defendant-employer. The plea of prescription (statute of limitations) was settled by stipulation between the parties, which recognized that under the applicable jurisprudence of that time claims were barred by a statute of limitations of one year except for those plaintiffs who were in the armed forces of the United States during the period, the application of the statute being suspended (or tolled) during the period of military service under the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.A. 501, et seq.). Other exceptions and pleas, except for a plea of estoppel which was not ruled upon by the court of original jurisdiction or by the Louisiana Court of Appeal, were overruled by the trial court. The defendants then filed an answer which affirmatively alleged that the employer had paid the plaintiff-employees all the compensation due them, including the period of preliminary and postliminary change-of-clothes activities. It was affirmatively alleged that the employees had been paid on the basis of eight hours per day, which included the preliminary and postliminary activities contracted for, but which did not compensate for a period of one-half hour during each shift, which was designated as a "free and uninterrupted lunch period." By stipulation the issues upon the trial of the case on the merits were restricted to the compensability of this one-half hour period per working shift termed "lunch period."

The trial court found the "lunch period" to be free and uninterrupted and hence non-compensable under the Federal Statute. The Court of Appeal, First Circuit, sustained the decision of the trial court (83 So.2d 150) after the cases were

transferred to it for determination by the Louisiana Supreme Court, which held (70 So.2d 92) that the Court of Appeal had proper appellate jurisdiction over the cases. The Court of Appeal refused an application for a rehearing, and the Louisiana Supreme Court denied application for writs of certiorari and review under its supervisory, discretionary powers to review final decisions of the Court of Appeal.

II. THE FACTS MATERIAL TO THE QUESTION PRESENTED.

Petitioners are employed in a chemical plant making tetraethyl lead. The manufacturing process in the portion of the plant in which these employees work consists basically of attending the pumps and pressure gauges which pump various chemicals into a large pressure cooker (termed an autoclave). The mixture is subjected to heat and pressure and agitated for a certain period. The contents are then pumped out of the cooker to another part of the plant. Most of the machinery is of a semi-automatic nature, and the duties of these employees are to activate certain pumps at various stages of the processing cycle and to be available for emergencies which might arise through malfunctioning of the machinery. The time studies in the record and the findings of the Court of Appeal (*infra*, Appendix A, at p. 39) indicate that much of the time of these employees is spent in waiting or standing-by.

The plant is operated continuously. A shut-down would be costly and dangerous in view of the nature of the chemicals, such as sodium, which are pumped through miles of copper tubing in a liquid state, heated and under pressure. A stoppage might result in the chemicals solidifying in the cop-

per tubing, rendering it useless, and creating a danger of fire and explosion. Due to the inflammable and caustic nature of certain chemicals, the employees are required to bathe and don special clothing before entering the work areas, and to bathe and remove such clothing before leaving the plant.

The plant is operated on a 24-hour basis with three shifts of employees, each of which is paid for eight hours of work. The shift of each employee requires his presence at least eight and one-half hours. Of this time, one-half hour is devoted to changing of clothes and bathing before and after each shift, which is made compensable by contract with the employer. During the remaining eight hours each employee is allowed two fifteen minute rest breaks and a thirty minute meal period. Employees are compensated for the two rest periods, but they have not been paid for the lunch period since October 12, 1945. The company provides "change houses" in which the employees change clothes, bathe, are allowed to smoke during rest periods and are allowed to eat their lunch during the meal periods. A cafeteria is also provided on the premises in which the employees may purchase food during the meal periods. The employees are unable to distinguish for purposes of compensability for time spent in these "change houses" between bathing, changing clothes, resting, smoking, or going to the toilet and time spent in that area for eating lunch.

The Court of Appeal, First Circuit, of Louisiana, in its opinion (*infra*, Appendix A, at p. 31) stated:

> "It is admitted that due to the size of the plant it is impractical and almost impossible for the employees to leave the plant premises and return home or go to a

> restaurant for their lunch period, and they are, instead, restricted to eating in a cafeteria or a 'change house' if they bring their own lunch. Because of the potentially dangerous nature of the chemicals and the processes involved, employees cannot leave the premises without a pass."

For purposes of this petition we accept this statement of fact by said Court in its opinion. The existence of this condition was reiterated by said Court in its opinion in a subsequent discussion of the facts, as follows (*infra*, Appendix A, at p. 40):

> ". . . It was true that it was physically impossible for the plaintiffs-employees to eat off of the premises due to the size of the plant and the fact that it would be necessary for them to change their clothes and obtain a pass, all of which would be impossible in the 30 minutes allotted for the lunch period."

These facts pose the first question here presented, namely, that of whether lunch time of employees is compensable when the employee is unable to leave his employer's premises during such period.

As to the second question here presented, namely, the compensability for a lunch period during which the employee is subjected to employer regulations and the possibility of immediate recall to assigned duties, the findings of fact by the trial court and the Louisiana Court of Appeal are not as clear-cut. The first quotation from the opinion of the Court of Appeal in the preceding paragraph mentions the fact that the employee is subject to employer regulations which designate the area in which lunch may be eaten and the necessity

of obtaining a pass to leave the premises. As to other types of restrictions by the employer, the opinion of the Louisiana Court of Appeal states (*infra*, Appendix A, at p. 31):

> ". . . . The plaintiffs-employees further point out that they are unable due to reasons of physical limitation to remove their company clothing and leave the plant premises during the lunch period, and that during this time they are subject to certain restrictions on their conduct such as being unable to indulge in 'horse play' and athletics. As to these restrictions, the District Court found that the restriction against 'horse play' was only a normal safety precaution, with which we agree, and that the alleged restrictions on recreational activities were not restrictions by the management but were attributable to the physically crowded nature of the plant."

In a subsequent discussion of the facts, the opinion of the Louisiana Court of Appeal (*infra*, Appendix A, at p. 41) further stated:

> "On the other hand, the employees presently before the Court have certain specific production duties performed at a specific post of duty, and while much of their time may be on a 'standby' basis and nevertheless part of the working hours, when they are away from their post of duty another employee performs their functions. While technically they may be available in the event of emergency, the record and the finding of the district court is that in actual fact such emergencies are of rare occurrence. The remote possibility of such interruptions of the lunch period is not of such practical benefit to the employer as to be of significance as an economic factor in the utilization of the lunch period. The record supports the district court's finding that during this lunch period the employees are relieved of all duties and all super-

> vision by the employer and are free to employ it for whatever personal uses they desire, including not only eating but napping, resting, chatting, subject, of course, to the physical restriction of the plant site and such safety rules as those prohibiting 'horse play'."

It is the contention of the petitioners that these findings merely relate to the reasonableness of the employer restrictions and the efficiency of the plant machinery which during the period in question was not subject to frequent breakdowns or stoppages. These findings do recognize that the employees are subject to employer restrictions against "horse play," are unable to engage in recreational activities, and are subject to being recalled to their post of duty if and when the occasion should arise. No distinctions or differences are found in the nature of the supervision over the employees during the lunch period from those in effect during the bathing, changing of clothes, or rest periods.

The opinion of the trial court and that of the Louisiana Court of Appeal place great emphasis upon the fact that the assigned tasks of an individual employee are performed by others whenever he is temporarily away from his assigned post of duty. It is the position of the petitioners that this situation does not make that individual employee's required presence on the plant premises any less necessary or conducive to the continuous manufacturing process for which he is employed and for which he should be compensated.

III. FEDERAL QUESTION RAISED IN THE STATE COURTS.

Petitioners filed suit to recover wages allegedly due them pursuant to the Federal Fair Labor Standards Act of 1938

(29 U.S.C.A. 201, et seq.). Recovery was sought at the federal statutory rate of one and one-half times the regular rate of pay (29 U.S.C.A. 207(a).) plus the liquidated damages and attorney fees authorized by federal statute (29 U.S.C.A. 216(b).). The sole issue is whether or not the designated lunch period of these employees is compensable within the meaning of these federal statutory regulations of interstate commerce. That the employer and these employees were engaged in interstate commerce and hence subject to this federal regulation was admitted and is not an issue. Nor is there any issue relative to the Federal Portal to Portal Act (29 U.S.C.A. 251, et seq.) as there is no issue as to the compensability for preliminary or postliminary activities, the time in question being that during the course of each employee's regular work shift which has been designated by the employer as a "lunch period."

ARGUMENT

I. REASONS WHY CERTIORARI SHOULD BE GRANTED.

(A) To permit an employer engaged in the production of goods in interstate commerce to avoid liability for wages to employees for time required to be spent on the employer's premises and while subject to the employer's supervision, restrictions, or control or while available for duty during the course of the normal work day, by the simple expedient of labeling portions of such time as "lunch time," "rest period," "idle time," "stand-by time," or similar appellation will nullify the regulations by Congress concerning hours of work and rates of pay in interstate commerce such as the Fair Labor Standards Act.

The petitioners are required to be present on their employer's premises for eight and one-half hours per day in order that three shifts of workers can maintain a continuous production process. They are paid for only eight hours of that time, which purports to include stand-by periods, two fifteen minute rest periods, and two fifteen minute periods of preliminary and postliminary bathing and changing of clothes. The employer designates an arbitrary one-half hour during the course of the working shift period as non-compensable under the term "free and uninterrupted lunch period." If the supervision and control over employees during that half hour and their availability for duty during that time is no different from other portions of the working day, such designation can only be a subterfuge to escape liability under the Federal Fair Labor Standards Act.

(B) To avoid nullification of existing Federal Regulation of wages and hours of work on employees engaged in interstate commerce, it is necessary that this Court establish a test for the determination of compensability of time devoted by an employee on the employer premises to eating lunch, standing-by, waiting or resting during the course of a continuous manufacturing process.

This Court has been called upon repeatedly to interpret the Federal Fair Labor Standards Act with relation to the compensability of various activities of employees while on his employer's premises. In the course thereof, this Court has set forth the tests to be applied for determining compensability of employees while engaged in preliminary and postliminary activities or while engaged in various activities when employed on an "on call" basis, such as those performed by watchmen and firemen. It is respectfully submitted that those

tests are not applicable to the situation of employees having assigned tasks when they are temporarily relieved from the tasks but are required to remain on the premises, subject to control and supervision, and available for recall to the assigned duties.

The Louisiana Court of Appeal in its opinion (*infra*, Appendix A, at p. 33) attempted to apply the tests established by this Court as to the compensability of "on call' time of firemen or guards while engaged in eating or sleeping. Those tests were established by this Court in its decisions in the cases of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124, and *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118. The opinion of the Court of Appeal distinguished those cases from the problem presently before it of employees having "certain specific production duties performed at a specific post of duty," and failed to apply the tests enumerated in those decisions to the present problems of compensability.

It is submitted that there may well be situations where an employer is not liable for wages for lunch periods of certain employees, possibly such as during the lunch period of a typist whose functions entirely cease when the assigned post of duty is left. Such situations differ factually from those where a continuous manufacturing process continues, for which the continued near-by presence and availability of an employee is necessary for the employer's benefit. The present petitioners may be likened unto cooks tending a giant pressure cooker, and it can hardly be said that they are entitled to wages only while actually "tending the pot." Yet there are no tests or guides for determining pay when they turn aside

to other activities while the pot is cooking. Unless this Honorable Court provides a test or designates the applicability of the tests laid down in the *Swift & Co.* and *Armour & Co.* decisions, *supra*, employers may arbitrarily avoid liability for wages to employees under the Fair Labor Standards Act whenever they are permitted to digress from the performance of specifically assigned tasks by the expedient of labeling these activities by a non-compensable term such as "lunch period."

II. PERIODS OF TEMPORARY RELIEF FROM ASSIGNED PRINCIPAL ACTIVITIES DURING THE NORMAL WORK DAY OF EMPLOYEES ENGAGED IN A CONTINUOUS MANUFACTURING PROCESS ARE COMPENSABLE UNDER THE FEDERAL FAIR LABOR STANDARDS ACT, ALTHOUGH SUCH RELIEF FROM ASSIGNED TASKS AFFORDS THE EMPLOYEE OPPORTUNITY FOR ATTENDING TO HIS PERSONAL, PHYSICAL NEEDS SUCH AS EATING OR RESTING.

In the numerous cases wherein this Court has been called upon to interpret the Federal Fair Labor Standards Act of 1938 (29 U.S.C.A. 201, et seq.) with relation to compensability for various activities of employees while on the employer's premise, it has been made clear repeatedly that it is not required that the employees' activities be necessary or indispensable to the production of goods in order to be considered compensable as work under the terms of the Act. Aside from cases involving preliminary and postliminary activities, which are not in question here, the latest decisions by this Court with reference to compensability for employees'

time spent during the main work-day period in incidental activities are those two cases decided on the same day in 1944 of *Armour & Co. v. Wantock, supra,* and *Skidmore v. Swift & Co., supra.* Both of those decisions relate to activities of employees who were hired to wait, *i.e.* were primarily employed upon a stand-by basis as firemen or guards. For persons so employed this Court held that compensability was basically a question of fact whether during the time in question the employee is actually free to pursue his private needs or pleasures, or whether the time spent is predominantly under the control of the employer and for the employer's benefit.

In the numerous cases in the various other federal and state courts during the ensuing twelve years, the application of this test has been regularly resolved by the determination of whether the employee during the period of incidental activity is still responsible for the principal assigned duties for which he was employed. (See Appendix E, *infra,* pp. 59-64, for list of cases in which compensability of lunch period was allowed or disallowed.) Such a determination may be a practical application of the test established by this Court when the employee is hired primarily to stand-by or when the employee eats while physically performing his principal assigned duties. However, it totally ignores the possibility that the employee activity of brief rest, eating, or attending his physical needs away from his assigned post of duty or while temporarily abandoning his assigned tasks may be physically necessary or conducive to his continued efficiency for his employer's benefit. It is the contention of the petitioner that activity of this nature, while necessary for the employee, is beneficial to the employer and is compensable under the Fair Labor Standards Act as work. In the present cases, whether

the employee-petitioner smokes, rests briefly, bathes or changes clothes in the employer's "change house" or whether he eats there, he is contributing fully to the employer's benefit and should be paid therefor. Even though another person attends the machines or other principal duties of the employee while he is excused therefrom and is absent from the place of such duty, the employer receives the full benefit of having him available on the premises and having him resume his principal duties shortly or take over the duties of another employee needing relief, thereby making possible the continuous production of goods by the employer's plant which would otherwise have to shut-down to afford all employees the opportunity to simultaneously attend to their individual physical needs.

III. THE TEST FOR COMPENSABILITY OF PERIODS OF TEMPORARY RELIEF FROM ASSIGNED PRINCIPAL DUTIES WHICH RELATE TO A PRODUCTION PROCESS THAT CONTINUES IN AN EMPLOYEE'S ABSENCE SHOULD BE WHETHER THE PERMITTED ABSENCE IS FOR THE PURPOSE OF REASONABLE ATTENDANCE TO THE EMPLOYEE'S PERSONAL, PHYSICAL FUNCTIONS NECESSARY TO HIS CONTINUED EFFICIENCY UPON RESUMPTION OF ASSIGNED DUTIES (SUCH AS BRIEF REST, EATING, OR USING TOILET) OR WHETHER THE PURPOSE OF THE RELIEF FROM DUTY IS FOR ATTENDANCE TO THE PERSONAL BUSINESS OR PLEASURE OF THE EMPLOYEE WHICH IS UNRELATED TO HIS CONTINUED EFFICIENT PERFORMANCE OF ASSIGNED DUTIES.

The test of whether an employee is entitled to wages under the Fair Labor Standards Act when he is temporarily relieved from his principal duties or is temporarily absent from his assigned post of duty should not be the degree of employer supervision and control during that period nor an attempted evaluation of whether his activities during that period of time are more beneficial to him as an individual than they are to his employer. Either invites multiplicity of litigation with a hiatus of arbitrary results. Nor does an arbitrary rule of thumb, such as the de minimis doctrine, based upon the amount of time spent by the employee afford an equitable solution.

If the Court will recognize that an employee may be entitled to wages because his presence on the employer's premises makes possible the continuous operation of the plant even though temporarily relieved of the primary duties for which he was employed or responsibility therefor, the petitioners submit that the test as to compensability for activities during periods of such relief should be based upon the purpose for which the employee is so relieved from duty. The employee should be paid if he is temporarily relieved for the purpose of reasonable attendance to his personal, physical needs or functions, the performance of which are necessary or conducive to his continued efficiency upon resumption of his assigned duties. Those physical functions include resting, using the toilet, smoking, and eating within the reasonable demands of the human body under the prevalent working conditions. The employee should not be paid if he is relieved, even though only temporarily, if the purpose of his relief is to permit him to attend his personal business or pleasure or other matters not related to his continued efficient perform-

ance of his assigned duties. Entitlement to wages should be conditioned upon the employee remaining upon the employer's premises, whether by employer regulations or because of the nature and location of the premises and the work conducted thereon. In other words, he should be within the ready reach of the employer even though he may be infrequently called. While in such a situation, the extent to which the employee contributes to his employer's benefit through making continuous production possible may be evidenced by such factors as the presence of some employer supervision or control over him irrespective of the extent thereof, his physical availability for recall to duty irrespective of the frequency of occurrence thereof, and the scheduling and duration of the periods of relief from the standpoint of whether they are at the convenience of the employer rather than that of the employee.

CONCLUSION

The ruling below denies compensation to the petitioner-employees for wages to which they are entitled under the Federal Fair Labor Standards Act for activities on their employer's premises which are primarily for the benefit of the employer because they make possible the continuous operation of the employer's plant. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE

I, of counsel for petitioners, do hereby certify that I have this day served a copy of the foregoing petition for writ of certiorari by mailing same air mail, postage prepaid, to counsel of record for defendants as follows:

Vernon Porter
La. National Bank Bldg.
Baton Rouge, Louisiana

April 10, 1956.

/s/ DeVan D. Daggett
Of Counsel

APPENDIX A

Opinions Below

OPINION OF THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA, WHICH IS REPORTED AT 83 SO. 2D 150

IN THE

Court of Appeal

FIRST CIRCUIT

STATE OF LOUISIANA

Docket No. 3938

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION

Appeal from Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. Hon. G. Caldwell Herget, Judge.

ELLIS, J.:

Plaintiffs filed this suit in which they are seeking to recover overtime compensation under the Federal Fair Labor

Standards Act of 1938 U.S.C. Title 29, § 201 et seq., 29 U.S.C.A. § 201 et seq., and the Portal to Portal Act of 1947, U.S.C. Title 29, § 251 et seq., 29 U.S.C.A. § 251 et seq., for a thirty minute lunch period which they contend was not free and uninterrupted. The suit as originally filed was one for a thirty minute change of clothes time, but by agreement and sitpulation the issue presented the lower court and this court is whether the lunch period of the plaintiffs was compensable under the law applicable. Stated another way: "Do the plaintiffs have a free and uninterrupted lunch period?"

Plaintiffs specifically contend that they are entitled to wages for all time devoted to either performing their assigned tasks or standing by to do so, and that in the latter instance compensability is not dependent upon the company rules or upon frequency of interruptions of an employee but is dependent upon whether an employee is subject to supervision and is primarily engaged on a "stand-by" basis for the benefit of the employer.

Prior to the filing of the answer and trial, a number of pleas and exceptions were filed but the only ones remaining on which there was a disagreement was the plea of estoppel based upon the settlement of a prior case known as the *Williamson* suit, filed November 13, 1945, in which many of the plaintiffs herein were plaintiffs therein, whereby it was agreed that the 30 minute change of clothes time was compensable, and the plaintiffs in the *Williamson* suit, as well as employees who had not joined in the suit but were entitled to the benefits of the settlement, were paid for this change of clothes time. This stipulation and agreement as to the facts upon which the settlement was based in the *Williamson* suit provided in part as follows:

"5. The question of the compensability of change of clothes time, as that term is defined in defendant's answers, as amended, and the amount of time required for change of clothes, if compensable, was placed at issue before the Eighth Regional War Labor Board under notice and stipulation set forth in the pleadings in this suit, copies of which are attached hereto as Annexes 1 and 2, respectively.

"6. On October 26, 1945, that Board handed down its Directive Order and Arbitration Award, a copy of which is attached hereto as Annex 3.

"7. This Directive Order and Arbitration Award recognized that all TEL workers and sodium cell room workers were entitled to change of clothes time, but held that other sodium section workers were not so entitled because they were not required to change clothes, and the agreement of settlement in support of which this stipulation is filed, recognizes and gives effect to this ruling of said Board.

"8. The Directive Order and Arbitration Award, fixing the amount of time required for change of clothes time at thirty (30) minutes per day, was based upon evidence adduced at the hearing before said Board, the accuracy and correctness of which are hereby recognized and acknowledged by the parties hereto. Included in this evidence were Annexes 4 to 10, both inclusive, copies of which are annexed hereto and made a part hereof.

• • • •

"11. With respect to all TEL workers other than straight day workers with whom settlement has heretofore been made, the defense that they have been paid all overtime compensation to which they are entitled is based upon the claim that they necessarily spent on the plant

not more than eight and one-half (8½) hours each day, seven and one-half (7½) hours of which was spent working on the job, one-half (½) hour for a free and uninterrupted lunch period, and not more than one-half (½) hour for change of clothes time, walking time, shift changing time, bathing time, or otherwise. Defendants contend that this schedule has been in effect continuously for more than two years immediately prior to the institution of this suit.

"12. Plaintiffs acknowledge and recognize that plaintiffs referred to in paragraph 11 now have a free and uninterrupted lunch period of one-half (½) hour, but contend that this practice with respect to the lunch hour was not established until late in 1945, prior to which time the one-half (½) hour lunch period was neither free nor uninterrupted. All other details of the work schedule have been recognized and admitted hereinabove to be correctly shown by the attached schedules.

"13. Therefore, the purpose in agreeing that this settlement shall be made and judgment rendered herein on the basis of thirty (30) minutes for each day worked for a period of eleven months, beginning November 13, 1944, and ending October 12, 1945, is to effect a transaction and settlement of this dispute concerning questions of fact, in the manner set forth in the joint petition to which this stipulation is attached, which every one of the parties hereto prefers to the hope of gaining balanced by the danger of losing."

The judgment in the *Williamson* suit was dated March 10, 1947 and was based upon a prior judgment of date January 9, 1947, which approved the settlement made by the parties thereto and the stipulation of facts upon which it was based as above recited and which the Court adopted as its finding of fact in approving the settlement.

It is therefore contended by the defendants that all plaintiffs in the present suit who were plaintiffs or participated in the settlement in the *Williamson* case were estopped to now claim compensation for the 30 minute lunch period. The present suit seeks overtime compensation for the 30 minute lunch period from June 27, 1946, to June 27, 1947. Plaintiffs and defendant stipulate that the prescription of one year is applicable to plaintiffs' claim subject to the suspensive effect of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 501 et seq., as to plaintiffs who had served in the military services of the United States during World War II during the term of such service.

The Lower Court in effect referred this plea to the merits and after trial which was long enough for the transcript of testimony to contain some 2,899 pages, did not specifically pass upon the plea of estoppel as he stated that it was unnecessary in view of his opinion that the plaintiffs' suit should be dismissed on the merits. The District Court after trial and immediately upon the closing of the testimony dictated his oral reasons into the record in which he stated that the plaintiffs had failed to sustain the burden of proof and dismissed their suit at their costs. Judgment was rendered and signed by the District Court, and the plaintiffs by petition through their counsel secured an order of devolutive appeal returnable to the Supreme Court "upon their furnishing bond with good and solvent surety, conditioned as the law directs, in the amount of $50.00 each." The Supreme Court transferred the appeal to this court upon the finding that the claim of the individual plaintiffs was below their jurisdictional amount.

[1] The defendant has filed a motion to dismiss the appeal of 300 of the 520 plaintiffs named in the judgment herein

as they did not give bond by June 4, 1953, the first anniversary of the signing of the judgment. As stated in the defendant's brief:

> "The underlying philosophy of the motion in both of its aspects is the several nature of plaintiffs' claims, which for that reason require separate bonds on appeal, and which cannot be cumulated for jurisdictional purposes under the Fair Labor Standards Act."

The plaintiffs-appellants maintain that the filing of an appeal bond for costs by any one of the appellants would suffice to perfect the appeal for all of those who joined in the motion for the appeal, regardless of the recitation in the order of the District Court requiring individual bonds.

A decision upon this point by our Supreme Court is that of *Vienne v. Chalona*, 203 La. 450, 14 So.2d 54, 55. There joint plaintiffs, in one petition, sought recovery of damages in tort occasioned by a single automobile accident. Each plaintiff recovered judgment in a different amount and both took a devolutive appeal, allowed in a single order upon a joint motion. Only one appeal bond was filed. The Supreme Court, holding that one bond for costs was sufficient for both appellants, used the language following:

> "The reason why there was only one motion for an appeal, only one order of appeal, and only one appeal bond, is that there was only one lawsuit in which the plaintiffs had joined in one petition, founded upon one cause of action. The plaintiffs had the same right to join in one motion for an appeal that they had originally to join in one petition for a judgment in favor of each of them. There was no more necessity for having two separate motions for an appeal, or two orders of appeal, or two

appeal bonds, than there was originally to have two separate petitions,—one for each plaintiff. As far as the appeal bond is concerned we must bear in mind that, according to Article 578 of the Code of Practice, the only bond that can be required of an appellant, for a devolutive appeal, is a bond 'to secure the payment of the costs'. As there is only one lawsuit here, and only one appeal, notwithstanding there are two appellants, there can be only one cost bill; and there is no necessity for having two bonds to secure one and the same cost bill."

The Court of Appeal, Second Circuit, in *Security Insurance Co. v. Couvillion*, 16 So.2d 262, 264, followed the *Chalona* case and quoted from the language of the Supreme Court in its per curiam on the rehearing of the *Chalona* case, as follows:

" 'There was a difference in their (plaintiffs) causes of action in that the cause of action of one of them might have been subject to defenses not applicable to the cause of action of the other plaintiff. The importance of that, however, passed out of the case when the defendants failed to plead that there was a misjoinder—if in law there was a misjoinder—of parties plaintiff: It is sufficient to say now, for the purpose of passing upon the motion to dismiss the appeal, that there was only one lawsuit,—and that the defendants long ago waived whatever right they might have had to require two separate lawsuits.' "

Our Supreme Court has consistently held that only one appeal bond is required for multiple appellants from a single judgment. See *Succession of Clark*, 1879, 30 La. Ann. 801; *Succession of Geddes*, 1884, 36 La. Ann. 963; *Schleider v. Martinez*, 1886, 38 La. Ann. 847; *People's Brewing Co. v. Babinger*, 1888, 40 La. Ann. 277, 4 So. 82; *Wegmann v. Wegmann*,

1900, 52 La. Ann. 1309, 27 So. 889; *Succession of Housknecht* 1914, 135 La. 818, 66 So. 233, L.R.A. 1915B, 396; *Palmetto Moss Factory v. Texas & Pacific Ry. Co.*, 1919, 145 La. 555, 82 So. 700.

In the cases before us now, the various claims of the different plaintiffs arose from a single contract and no exceptions of misjoinder were ever filed by the defendant and all of the claims were rejected by a single judgment below. A joint motion for appeal was made and a single order of the Lower Court was issued allowing the appeal.

The motion to dismiss the appeal is therefore overruled.

ESTOPPEL

In view of the conclusion which we have reached that the judgment of the Lower Court is not manifestly erroneous and should be affirmed, it is not necessary that we discuss or pass upon this plea.

MERITS

[2] Plaintiffs in this court contend that the District Judge erred in holding that they must sustain the burden of proof, arguing that they had brought suit for the recovery of wages alleged to be due them pursuant to a written contract which causes of action were basically to enforce a conventional obligation, and that the defendant, having filed an answer, conceding that the plaintiffs were on the plant for 8½ hours per day, and asserting the defense that the plaintiffs had been fully paid all that was due them under the contract of employment, and in order to sustain the defense that the obligation to pay wages had been fully performed, the defendant

further alleged that the plaintiffs each had a ½ hour lunch period per day which was not compensable, and that, therefore, the sole issue upon the merits being the compensability of this lunch period which the defendant was urging to support its claim that it had performed its obligation to pay wages, the defendant therefore bore the burden of proof.

In short, the ingenious argument is made by the plaintiff that the defense is a plea of payment or exoneration and therefore, the defendant has the burden of proving same, however, as the cases cited by plaintiffs indicate, this rule of law applies when the obligation is admitted by the defendant and the defendant then seeks exoneration by reason of payment of same. Here, however, the plaintiff is seeking to prove the obligation arising by reason of a statute rather than by contract, and the defendant has denied the very existence of the obligation. The defendant is not claiming extinguishment of an admitted obligation but denies that any obligation whatsoever arose. As in all cases of suits on obligation, the plaintiff has the burden of proving the obligation and, therefore, the District Court correctly held the burden of proving this obligation rested on the plaintiffs rather than on the defendants. The burden of proving that they did not have a free and uninterrupted lunch period and that it was, therefore, compensable under the law, rested upon the plaintiffs.

Plaintiffs-employees contend that they are subject to company call, direction, control and supervision during the entire 8½ hours spent on the defendant-employer's premises including the 30 minutes labeled as a "lunch period." Basically, they contend that the duties of their employment consist not only of the performance of an assigned task but of con-

siderable "stand-by" time, and that although it is true that they are required to leave their post of duty during the lunch period, they are subject to call and are actually called during the time technically allowed to them as their lunch period. Thus, the lunch period is not free for their own use but is merely a portion of their "stand-by" time, whereby they are on the premises for the benefit of the employer to take care of emergencies and to take care of the machinery and processes of the plant. The plaintiffs-employees further point out that they are unable due to reasons of physical limitation to remove their company work clothing and leave the plant premises during the lunch period, and that during this time they are subject to certain restrictions on their conduct such as being unable to indulge in "horse play" and athletics. As to these restrictions, the District Court found that the restriction against "horse play" was only a normal safety precaution, with which we agree, and that the alleged restrictions on recreational activities were not restrictions by the management but were attributable to the physically crowded nature of the plant. Plaintiffs-employees also contend that they were not allowed to sleep during this lunch period.

It is admitted that due to the size of the plant it is impractical and almost impossible for the employees to leave the plant premises and return home or go to a restaurant for their lunch period, and they are, instead, restricted to eating in a cafeteria or a "change house" if they bring their own lunch. Because of the potentially dangerous nature of the chemicals and the processes involved, employees cannot leave the premises without a pass.

The defendant contends, on the other hand, as taken from his brief:

"The defendant, in reply, says that the plaintiffs, during the lunch period, have no duties to perform, and are subject to no rules, other than those dictated by statute, safety, decency and common sense, and which are applicable to all persons on the plant, without any distinction whatsover.

"The defendant says also that the rules are inflexible that an employee must be given a free and uninterrupted lunch period of 30 minutes. In case of emergency, or unforeseeable event, an employee might be recalled from his lunch, but in that case, he would be given a substitute period of 30 minutes, not including any time that might have been consumed at time of recall; and if the remaining available time in the work day was insufficient for that purpose, the employee would be paid for 30 minutes at time and a half overtime."

The two lead cases cited to us by both plaintiffs and defendant are *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L.Ed. 124, and *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118, concerning "on call" time of firemen or fire guards spent in sleeping, recreation, and eating. In holding much of such time compensable as hours that should be included in the workday, the Supreme Court pointed out that employment may consist not only of performance of specific labor but also the employee's presence on a "stand-by" capacity to perform duties as needed. "Idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself." *Armour & Co. v. Wantock*, 323 U.S. 126, at page 133, 65 S.Ct. 165, at page 168. The hours of work include not only time spent in actual labor by the employee, but also the time given to the employer. It was observed in the earlier case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local*, 321 U.S.

590, 64 S.Ct. 698, 88 L.Ed. 949, allowing travelling time to miners (portal to portal pay), that an employer cannot be allowed to command all of an employee's time while compensating him for only part of it.

But these cases also are authority for the holding that whether the waiting time is worktime depends on all the facts and circumstances of each case, and is basically a question of fact whether during the time in question the employee is actually free to pursue his private needs or pleasures or whether the time spent is predominantly under the control of the employer and for the employer's benefit. For instance, in the *Skidmore* case above cited, the Court held that the time of the firemen required to be on the premises 3½-4 nights per week was "working time," although actually consumed in playing checkers, listening to the radio, etc., since the firemen were "on call' for the employer's benefit in affording fire protection, and these employees were thus required to give their time to their employer, which they would have spent otherwise had they been free to, but excluded from the worktime for which compensation was allowed was the time spent in eating and sleeping, as pursuits of a private nature very infrequently interrupted which could be adequately and comfortably followed in the facilities afforded the employees and which presumably the employees would have spent their time whether on the premises or off. In both the *Wantock* and *Muscoda Local* cases above the District Court, 40 F.Supp. 4, 10, had excluded eating time (in the latter, a "fixed lunch [period] of one-half hour during which the employees [were] relieved of all duties"), from which ruling the employees had not appealed, and concerning which the appellate courts expressed no opinion.

In *General Electric Co. v. Porter*, 9 Cir., 208 F.2d 805, relied upon by plaintiff, the employer was required to pay firemen on a 24-hour shift every other day wages during the entire 24 hours, including the sleeping time, and the indicia relied upon included: the employer received the benefit of 24 hours of fire protection, since the men were on call and under the direction (subject to call) of their employer at sleep as well as awake; this was the only effective way for the employer to receive 24 hours of fire protection, to have the employees on the premises on a stand-by basis; the probability of interruption under the circumstances (furnishing fire protection to a community of 30,000 people) was more than very occasionally. Similarly, in *Glenn L. Martin Neb. Co. v. Culkin*, 8 Cir., 197 F.2d 981, and *Lindell v. General Electric Co.*, 44 Wash.2d 386, 267 P.2d 709, a 30 minute lunch period of guards was held to be compensable as working time, even though the employees were permitted (or required in the *Lindell* case) to leave their post of duty and theoretically relieved of all duties whatsoever. The rationale of these cases was that whether at their actual post of duty or in the cafeteria these employees were performing the duties for which they were paid, which were to be available and alert to quell disturbances or extinguish flames; thus they were not really free agents during the time in question, but were available for the employer's benefit. *Glenn L. Martin Neb. Co v. Culkin* dwelt more on, still engaged in "principal activity" even if theoretically free; *Lindell v. General Electric Co.* went more on: were under restrictions, had to be alert, did not remove uniforms as guards, and mere uniform as guard was function in inhibiting disturbance, unusual nature of atomic installation and necessity of exceptional alertness, etc.

Other cases relied upon by plaintiff which held the on-premise eating time of employees compensable are *F. W. Stock & Sons, Inc. v. Thompson*, 6 Cir., 194 F.2d 493, *Biggs v. Joshua Hendy Corp.*, 9 Cir., 183 F.2d 515; *Mills v. Joshua Hendy Corporation*, 9 Cir., 169 F.2d 898 and *U.S. v. Ewald Iron Co.*, D.C., 67 F.Supp. 67. In *F. W. Stock & Sons, Inc. v. Thompson*, above cited, the engineers did not leave their engines unattended, but ate with one eye on same, while the packers, millers, and oilers ate in the immediate vicinity of their machines upon which constant attendance was required so that the machinery could continue to operate without break-down. In the *Mills* case, above cited, the boilerman watched his boiler while he ate his lunch at a nearby desk, and thus "Services of the same type and character were rendered at all times." These cases are, of course, authority for the proposition that the merely labelling of a portion of the workday as "lunch period" does not remove it from the portion for which wages are due, if the employee actually during the period in question is performing services for the employer, even though of a stand-by nature.

Among the cases relied upon by the defendant-employer are *Fox v. Summit King Mines*, 9 Cir., 143 F.2d 926; *Tully v. Joshua Hendy Corporation*, D.C., 79 F.Supp. 709; *Thomas v. Peerless Carbon Company*, D.C., 62 F.Supp. 154; and *Sunshine Mining Company v. Carver*, D.C., 41 F.Supp. 60, where the lunch period of the employees was held not to be part of the working day. In these cases the employees were relieved of all duties during their lunch period which was fixed as to time and duration (although in exceptional situations it might be interrupted). In the *Fox* and *Thomas* cases they were free to go wherever they wanted, although normally they stayed near

the premises, but in the *Carver* case they could not do so when down in the mine shaft at lunch period, and in the *Tully* case they ate at their post of duty, although normal duties were suspended during lunch period and they spent the time for their personal eating and relaxing.

[3] Due to the many witnesses and the voluminous record of their testimony, a detailed discussion is impossible. The plaintiffs-appellants offered witness after witness, practically all of whom were plaintiffs, to the effect that they knew nothing of the establishment of a free and uninterrupted lunch period in November 1945 even though they were plaintiffs in the *Williamson* suit and benefited by a judgment in their favor, based upon a factual finding which had been established by agreement entered into on January 9, 1947, approximately six months prior to the filing of the present suit, that they had had a free and uninterrupted lunch period since November 1945. On the other hand, many of the plaintiffs, testifying under cross-examination under the Act, stated that they knew of the establishment of a free lunch period in November 1945 and that as a matter of fact they had enjoyed a free and uninterrupted lunch period since that date. There was detailed testimony to the effect that the defendant had established the rule that all employees were entitled to a free and uninterrupted lunch period and if they were called back they were then entitled to an additional free and uninterrupted lunch period, and if for any reason they were unable to obtain the additional time they were entitled to time and a half for the 30 minute lunch period. Of course, it is not only possible but probable that the plaintiffs who testified they knew nothing of the establishment of this lunch period did not know of the agreement which was entered into by the attorneys in the

Williamson case, yet, this agreement, if not amounting to an estoppel, is the strongest kind of evidence that a free and uninterrupted lunch period was established in 1945 and in existence on January 9, 1947, the date of the agreed stipulation in the *Williamson* case. We do not believe that the attorneys for the plaintiffs in the *Williamson* case did not discuss in detail the agreed stipulation of fact with any plaintiffs in that case or any authorized representative of the plaintiffs in the *Williamson* case before agreeing to the fact that the employees at the defendant plant enjoyed a free and uninterrupted lunch period from 1945 to the date of the agreement in January 1947.

The plaintiffs, who testified in their own behalf in substance on their contention in this case, stated that they had been called back from lunch many times on many occasions in connection with the production processes of the defendant company. In most all of these instances they were recalled by a fellow employee termed another operator. The record reveals that an operator had no authority to recall another operator, and it is further shown by the defendant's testimony that the purposes for which these plaintiffs testified they were recalled was not actually necessary to the continuance of production for the reason that time studies by experts had been made and that there were sufficient personnel at all times on each job to take care of any production problem other than an emergency such as an explosion or a fire, etc.

The evidence reveals that these plaintiffs, in fact all the employees in the various TEL (tetra-ethyl-lead) area, had much "stand-by" time on their hands during the seven hours for which they were paid as working time. Of course, the other hour for which they were paid was made up of two 15

minute smoke periods and two 15 minute change of clothes time, making a total of 8 hours for which the plaintiffs-employees were actually paid.

From a careful reading of the entire testimony in the case, we are led to the conclusion that no doubt plaintiffs-employees were recalled during their lunch period by fellow operators who were in fact unauthorized to do so to the knowledge of the recalled plaintiffs-employees, as a result of a custom or an understanding between the employees in order that they might finish with their duties without delay.

There is some testimony that some of the plaintiffs-employees were recalled on occasion by their foreman who had authority, however, these instances have been explained by the foremen so as to remove them as proof of plaintiffs' contention, for example, where an employee had overstayed his time for lunch. The plaintiffs' testimony would lead one to the conclusion that ruptured discs, which it is unnecessary to explain in detail, were a frequent, common occurrence, and that they were recalled from lunch many times because of them, whereas the defendant company has introduced an exhibit giving the exact number of disc ruptures from 1946 through March 25, 1952. That record shows that in 1946 there were seven ruptured discs of which only two took place during the lunch period. In 1947 there were nine ruptured discs of which only three took place during the lunch period, and in the entire period covering the year 1946 through March 25, 1952, there were only 87 disc ruptures of which only thirty took place during the lunch period, an average of less than five a year. In addition there is testimony of many witnesses on behalf of the defendant that operators were not called back for ruptured discs. There was sufficient personnel to take care

of such a situation and in such circumstances clean up men were called in.

The defendant has shown that as a result of the *Williamson* case it was very careful to provide a free and uninterrupted lunch period, to publicize among its employees the establishment of such a period and their absolute right to a free and uninterrupted lunch period of 30 minutes, has shown by many witnesses that they had full knowledge of this rule and definitely understood that if they should be recalled, which was only to be during a case of emergency, they were then entitled to a 30 minute additional lunch period and in default of this to time and a half. The agreed statement of facts in the *Williamson* case upon which it was settled and in which the plaintiffs therein, many of whom are plaintiffs herein, received quite a bit of money as a result thereof, plainly stated that the defendant in 1945 had established a free and uninterrupted lunch period which the plaintiffs therein had enjoyed ever since. Furthermore, the defendant has shown that as a result of time studies made by experts it was unnecessary to recall an employee from his lunch period except in case of an emergency. In fact, counsel for plaintiffs argues that plaintiffs-employees were employed to stand-by and states that proof of this is the fact that they did stand by most of the time that they were on the plant premises and, therefore, they were employed on that basis. It is true that the plaintiffs-employees did stand by a great part of the working time, but it was only during the eight hours for which they were paid. Defendant has in detail offered testimony to refute that of the plaintiffs to the effect that they were recalled for various reasons during their lunch periods on many occasions by positive testimony that on the occasions and for the reasons

given by the plaintiff for their recall during the lunch period it was absolutely unnecessary as the personnel and man power was more than sufficient to handle such situations without the recall of anyone from their lunch. The defendant has also shown that schedules were set up for its employees in the TEL area to obtain a 30 minute free and uninterrupted lunch period except in case of an emergency.

Plaintiffs also offered testimony to the effect that they were not permitted to sleep during their lunch period. On the other hand defendant offered testimony that they were free to sleep during their lunch periods, but on the occasions of which plaintiffs stated they had been waked up and told they could not sleep that they had overslept the 30 minute period or were sleeping during working hours. Defendant's testimony is to the effect that they are permitted to sleep or do as they please during the lunch period except that they are restricted in athletic activities and "horse play," neither nor both of which would prove the lack of a free and uninterrupted lunch period as heretofore mentioned. It was true that it was physically impossible for the plaintiffs-employees to eat off of the premises due to the size of the plant and the fact that it would be necessary for them to change their clothes and obtain a pass, all of which would be impossible in the 30 minutes alloted for the lunch period. Plaintiffs-employees had full knowledge of this condition when they sought and gained employment and, in addition, the defendant had no ruling against eating lunch outside the plant if time would permit.

Plaintiffs-employees also testified that they were required during electrical storms to report back to their various posts, whereas the defendant offered positive testimony that

only the foremen were required to report back during electrical storms.

We thoroughly agree with the finding of fact by the District Court that the plaintiffs have failed to prove that they did not have a free and uninterrupted lunch period as defined by the authorities heretofore cited.

Returning to the *Porter*, *Culkin* and *General Electric* cases, *supra*, relied upon by the plaintiffs, and others similar to these cases concerning plant guards and firemen, we find that they can be distinguished from the case under consideration. The major function of plant guards and firemen is not the performance of certain specific, localized industrial duties but to be available in the event of disturbance or fire. This general function they are performing wherever they are on the plant premises even when not at the post where generally stationed. On the other hand, the employees presently before the court have certain specific production duties performed at a specific post of duty, and while much of their time may be on a "stand-by" basis and nevertheless part of the working hours, when they are away from their post of duty another employee performs their function. While technically they may be available in the event of emergency, the record and the finding of the District Court is that in actual fact such emergencies are of rare occurrence. The remote possibility of such interruptions of the lunch period is not of such practical benefit to the employer as to be of significance as an economic factor in the utilization of the lunch period. The record supports the District Court's finding that during this lunch period the employees are relieved of all duties and all supervision by the employer and are free to employ it for whatever personal uses they desire, including not only eating but napping, rest-

ing, chatting, subject, of course, to the physical restriction of the plant site and such safety rules as those prohibiting "horse play." It was testified that the employees could leave the plant site, although due to the extent of the premises this would not be a practical choice.

[4] As to the other cases relied upon by plaintiff, viz., *F. W. Stock & Sons, Inc. v. Thompson, supra*; *Biggs v. Joshua Hendy Corp., supra*; *Mills v. Joshua Hendy Cor., supra* and *U. S. v. Ewald Iron Co., supra*, they can be distinguished on the ground that an employee on a "stand-by" basis in the immediate neighborhood of his machine is performing a practical service for his employer, whereas in the present case employees generally on a large plant premises but away from their immediate post of duty cannot in a practical sense be said to be on a "stand-by" basis, especially in view of the employer's evidence accepted by the District Court that an additional number of employees were hired by the employer in order that on an overall basis relief employees were always available to perform the duties of those employees at lunch. While perhaps in the exceptional event of an emergency the employer would have the benefit of the employee's services, it is an industrial truism that an emergency suspends all rules; and the fact that an employee, if located, might be recalled from his sleep at home in the event of an emergency and is therefore theoretically "on call" even while home, does not therefore render all 24 hours of the employee's day part of his working hours.

Taking all the facts and circumstances of the present case into consideration, the factual picture is much closer to that of the cases relied upon by the defendant-employer, such

as *Fox v. Summit King Mines, supra, Tully v. Joshua Hendy Corp., supra, Thomas v. Peerless Carbon Co., supra,* and *Sunshine Mining Co. v. Carver, supra.*

For the above and foregoing reasons the judgment of the District Court is affirmed at the cost of plaintiffs-appellants.

OPINION OF THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

This decision is not reported. It was dictated from the bench orally from the record in the transcript of the testimony.

IN THE

Nineteenth Judicial District Court

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

Docket Nos. 27130 and 26181

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION

PAUL B. PORTER, ET AL.,

versus

ETHYL CORPORATION, ET AL.

Opinion of Judge HERGET in District Court (Oral)

BY THE COURT: Gentlemen, I am going to decide the case without argument and without briefs.

This is a suit wherein certain employees of the defendant seek additional compensation for the years 1946 and 1947 on the ground that they were not given a free and uninterrupted lunch period. Though the trial has been a lengthy one, counsel and witnesses have presented the case courteously and ably.

One of the refreshing observations that the Court can make is that despite the nature of the suit the testimony of the witnesses, when analyzed, does not present the usual irreconcilable disputations which occur in suits of this kind. The record is voluminous; in fact, this is the longest trial in the history of this Court. Both sides have been given an opportunity to present their contentions, and I am sure that the Appellate Court will have before it a complete factual disclosure of the contentions made both by the plaintiffs and by the defendant. In addition to the testimony of the witnesses, the Court made a visitation to the plant for the purpose of observing the activities described by the witnesses and also the performance of the duties by the employees.

Defendant has interposed a plea of estoppel, but because of the decision of the Court, it will not pass upon this plea of estoppel.

In the main, the plaintiffs' contentions are: (a) that they were called back before completion of their lunch period; (b) that they were not permitted to sleep during their lunch

period; (c) that they were not permitted to eat off the premises; (d) that during the electrical storms they are required to report back to their various positions; (e) that there were no athletic activities permitted during the lunch period; and (f) that "horse play" was not permitted. There is controversy as to whether or not there was knowledge of the rule of the company to the effect that each employee would be entitled to a one-half hour lunch period uninterrupted. Witnesses for the plaintiffs have testified that no one had apprised them of this fact. The evidence shows that in 1945, following a hearing before the War Labor Board when change of clothes time was required to be paid for, management, in my opinion called in the various foremen and gave specific instructions in reference to the one-half hour lunch period; with further instructions that this rule or order be disseminated to the various employees.

Time studies which have been introduced by the defendant show that management considered the lunch period as well as rest periods in ascertaining and anticipating the number of employees required to man the job safely and effectively. Actual records which have been introduced in evidence reveal that there were few breakdowns of any major importance, and practically nil during the lunch period. In addition, the Court is impressed with the fact of the lack of complaints on the part of the various employees individually and through their union that they were being denied a free and uninterrupted lunch period. In so far as the employees being required to eat on the premises, the evidence in my opinion fails to show that there was such a requirement; although the company has furnished adequate facilities for this purpose in the change house, and in addition, a very nice

cafeteria, where the Court on its visitation had the pleasure of partaking of the food.

Necessarily, because of the time limit of thirty minutes, it is practically physically impossible for an employee to leave the plant of the defendant, go to a restaurant, and then return back to his employment within the thirty minutes' time; and of course this physical impossibility is increased twofold when consideration is given to TEL workers who, because of hygienic reasons, are required to bathe and change their clothes before leaving the plant.

While there was testimony to the effect that sleeping was not permitted during the lunch period, in my opinion, the evidence fails to disclose any rule on the part of the company which prohibits either a person napping or sleeping during a lunch period. In certain instances which were related by the plaintiffs where they were awakened while asleep, the evidence in my opinion reveals that these naps were being taken at times other than at the lunch period. There is testimony to the effect, on the part of the management, of the defendant, that any employee of the company could leave the premises of the defendant during his lunch period upon obtaining a pass, and such pass would be given to them.

The proof on the part of the plaintiffs consisted in the statement that they were not permitted to leave the plant during the lunch period; but no evidence of this conclusion was given, other than to say simply that they were not permitted to do so.

In so far as horseplay is concerned, it is in my opinion, a fair restriction on the part of management to eliminate such

activities because by nature men sometimes get into more difficult physical combat when a matter starts out simply as horseplay; and I don't regard this as any restriction of the employee during the lunch period any more than I would during other times that the employee is on the plant premises; in fact, whether employee or invitee, I believe that the company would be proper in preventing horseplay by any one on the plant premises.

In the many instances where the plaintiffs claim to have been interrupted by their fellow-operators, there is no showing that such interruption was on the authority of management.

In the beginning of this opinion I stated that the Court was pleased that this case did not present the usual irreconcilable disputations, and this is an illustration of that fact; for while I believe that operators for their own convenience recalled other operators from their lunch period, I don't believe that such recalling was done under the authority of the management, but only for the convenience of the operator that was recalling the one who was at his lunch period. Furthermore, it is my opinion that the evidence fails to show that during the lunch period the operator had any duties whatever to perform. It is true that in certain instances the operators might have been recalled from their lunch period, but in these instances, from the evidence in so far as I see it, these operators were either given another additional thirty minutes uninterrupted lunch period, or were compensated for the times which they have.

I am cognizant of the decisions which prove that an employee who is required to stand-by is entitled to pay for

standing by; but in this case the evidence, in my opinion, does not show that the company has the men on a stand-by basis during their lunch period. It must be remembered that in this case as well as in all civil cases, the burden of proof rests on the plaintiff to prove its case. In my opinion, the plaintiffs have failed to sustain this burden of proof; and therefore, for these reasons, judgment is rendered and will be signed dismissing the plaintiffs' suit at their cost.

OPINION OF THE SUPREME COURT OF LOUISIANA CONCERNING THE APPELLATE JURISDICTION, WHICH IS REPORTED AT 224 LA. 470, 70 SO.2D 92

SUPREME COURT OF LOUISIANA

No. 41,401

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION

No. 41,402

PAUL B. PORTER, ET AL.,

versus

ETHYL CORPORATION AND
E. I. DUPONT de NEMOURS CO.

Consolidated

On appeal from the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana, Division "B." Honorable G. Caldwell Herget, Judge.

PONDER Justice.

These suits, bearing docket Nos. 27,130 and 26,181 in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, were filed separately but by consent of the parties were consolidated for the purpose of trial in the District Court with separate judgments rendered in each suit. The issues involved in both are identical and for that reason they are herewith consolidated in this Court.

In these suits several hundred employees of Ethyl Corporation brought suit for alleged overtime compensation under the Federal Fair Labor Standards Act (U.S.C. Title 29, Paragraph 216, as amended May 14, 1947, c. 52, P. 5 (a), 61 Stat. 87) claiming that the thirty minute meal or lunch period was compensable under that act at one and one-half (1½) times the regular rate. There was judgment in the District Court in favor of the defendant and the plaintiffs have appealed. Defendant has moved to dismiss the appeals on two grounds: (1) as to all plaintiffs because it does not appear that any one of the plaintiffs are claiming an amount in excess of $2,000.00 exclusive of interest; and (2) as to all plaintiffs (some 395) for failure to give bond in order to perfect their appeal.

The record shows that the actions are a cumulation of numerous individual demands of amounts insufficient to confer appellate jurisdiction in this Court. It is admitted by

appellants that no single claim exceeds $2,000.00 exclusive of interest. Their contention is to the effect that the cumulation of their demands is the determining amount in controversy.

The later and well established jurisprudence of this Court is to the effect that several plaintiffs cannot give this Court jurisdiction by cumulating their individual demands, even though each claim is based on a similar or the same cause of action. *Landry, et al. v. Caffery Cent. Sugar Refinery & R. Co.*, 104 La. 757, 29 So. 349; *State ex rel. Summer Bldg. & Supply Co. v. Judges*, 105 La. 333, 29 So. 892; *State ex rel. North v. Ermon*, 133 La. 952, 63 So. 479; *Alessi v. Town of Independence*, 142 La. 338, 76 So. 792; *Sheffield v. Jefferson Parish Developers, Inc.*, 213 La. 799, 35 So. (2d) 737; *Langlois v. Lancaster*, 218 La. 1052, 51 So. (2d) 622; *Jackson v. Perkins*, 221 La. 525, 59 So. (2d) 708; *Parker et al. v. T. Smith & Son, Inc., et al.*, 222 La. 1061, 64 So. (2d) 432. The failure to perfect the appeals is a question to be determined by the Court of Appeal.

Since this case is not one which falls within the classification set out in Article 7, Section 10 of the Constitution of Louisiana, as amended, this Court has no jurisdiction. Under the provisions of Act No. 19 of 1912 (L.S.A.-R.S. 13:4441) we are authorized to transfer the appeal to the proper court rather than dismiss it.

For the reasons assigned, it is ordered that these consolidated cases be transferred to the Court of Appeal, First Circuit, provided that the record is filed in that court within 30 days from the date on which this decree shall become final; otherwise the appeal shall be dismissed.

APPENDIX B

Judgment Below

JUDGMENT

Court of Appeal

FIRST CIRCUIT

STATE OF LOUISIANA

Baton Rouge, La., Oct. 6th, 1955

Mr. DeVan Daggett, Atty.
C/o Loyola University Law School
New Orleans, Louisiana.

Dear Sir:

Beg to notify you that the Circuit Court of Appeal has rendered a decision in the following case in which you are counsel of record:

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION

PAUL B. PORTER, ET AL.,

versus

ETHYL CORPORATION
(Consolidated)

Judgment affirmed.

An uncertified copy of the decision of the Court of Appeal is enclosed herewith.

Yours very truly,

/s/ KARL LECKE
Clerk of Court

APPENDIX C

Order Denying Rehearing of Court of Appeal, First Circuit of Louisiana and Order of the Supreme Court of Louisiana Denying Writs of Certiorari and Review

Court of Appeal

FIRST CIRCUIT

STATE OF LOUISIANA

Baton Rouge, La., Nov. 22nd 1955

Mr. DeVan Daggett, Atty.
C/o Loyola University Law School
6363 St. Charles Ave.
New Orleans, Louisiana.

Dear Sir:

You are advised that an application for a rehearing has this day been acted upon in the following case, in which you are counsel of record:

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION

Rehearing refused on behalf of both Appellant and Appellee.

Yours very truly,

S/ KARL LECHE
Clerk of Court

Supreme Court of Louisiana

New Orleans

BY HAWTHORNE, J.: January 16, 1956

No. 42,739

LYLE E. HERNANDEZ, ET AL.,

versus

ETHYL CORPORATION
AND
PAUL B. PORTER, ET AL.,

versus

ETHYL CORPORATION ET AL.

In re: Lyle E. Hernandez et al and Paul B. Porter et al Applying for Certiorari or Writ of Review to the Court of Appeal, First Circuit, Parish of East Baton Rouge

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Writ denied. We find no error of law in the judgment of the Court of Appeal.

/s/ FWH
/s/ JBF
/s/ ALP
/s/ JBH
/s/ EHMcC
/s/ HAM
/s/ JDS

A TRUE COPY

Clerk's Office, New Orleans
January 16, 1956

/s/ Harold A. Moise, Jr.
Deputy Clerk

Supreme Court of Louisiana

New Orleans

BY HAWTHORNE, J: January 16, 1956

No. 42,741

LYLE E. HERNANDEZ, ET AL.

versus

ETHYL CORPORATION

AND

PAUL B. PORTER, ET AL.

versus

ETHYL CORPORATION, ET AL.

In re: Ethyl Corporation Applying for Certiorari or Writ of Review to the Court of Appeal, First Circuit, Parish of East Baton Rouge

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Writ denied. Writ having been denied plaintiffs, relators in

our case #42,739, it is not necessary to consider this application.

/s/ FWH
/s/ JBF
/s/ ALP
/s/ JBH
/s/ EHMcC
/s/ HAM
/s/ JDS

A TRUE COPY

Clerk's Office, New Orleans
January 16, 1956

/s/ Harold A. Moise, Jr.
Deputy Clerk

APPENDIX D

Statutes and Regulations Involved

Federal Fair Labor Standards Act of 1938, as amended 29 U.S.C.A. 201, et seq.

"§ 207. Maximum hours

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work-week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

. . . . . .

"§ 216. Penalties; civil and criminal liability; waiver of claims; actions by Administrator; limitation of actions

. . . . . .

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court

in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

. . . . . .

Federal Portal-to-Portal Act of 1947, as amended 29 U.S.C.A. 251, et seq.

APPENDIX E

List of Cases on Compensability of Lunch Period

I. Cases Allowing Compensation

Armour & Company v. Wantock (1944), 323 U.S. 126, 65 Sup. Ct. 165, 89 L.Ed. 118.

NOTE: This decision and the companion case of *Skidmore v. Swift & Co., supra*, established the initial test of compensability for employee activities while on a stand-by basis.

Baker v. California Shipbuilding Corp. (1947), 72 F. Supp. 322, 6 WH Cases 1004.

NOTE: Guards and firemen who the Court said spasmodically took some time off for lunch during the regular shift.

Biggs v. Joshua Hendy Corporation (CCA, 9th, 1950), 183 F. 2d 515, 9 WH Cases 497, Supplemental Opinion 187 F. 2d 447, 10 WH Cases 102.

NOTE: Court held lunch compensable as employees were "on call."

Culkin v. Martin Neb. Co. (1951), 97 F. Supp. 661, 10 WH Cases 225, Aff'd. (CCA, 8th, 1952) 197 F. 2d 981.

NOTE: Guards and firemen who were not adequately relieved and remained at their regular posts dur-

ing the lunch period, with duties almost identical with those when working at other times.

Donza v. Mercantile Ship Repair Co. (1946), 6 WH Cases 102 (N.Y. City Ct.).

NOTE: Guards on ships being repaired who had no regular lunch period during which they were free to leave their posts for a definite period.

Fleming v. Rex Oil & Gas Company (1941), 43 F. Supp. 950, 1 WH Cases 828.

NOTE: Pumpers who were compensated were charged with substantial responsibility for the successful operation of the pumps under their charge.

General Electric Co. v. Porter (CCA, 9th, 1954), 208 F. 2d 805.

NOTE: This case did not specifically involve lunch time but allowed compensation for sleeping time of firemen required to remain at fire station 24 hours per day.

Gorchakoff v. California Shipbuilding Corp. (1945), 63 F. Supp. 309, 5 WH Cases 695.

NOTE: Here the employee used the lunch period to discuss company business.

Handler v. Thrasher (CCA, 10th, 1951), 191 F. 2d 120.

NOTE: This case did not specifically involve lunch time but did allow compensation for waiting time while

employee who lived in oil field made himself available to start, stop and maintain pumps in the field despite contract whereby he agreed not to work over 40 hours a week.

Lindell v. General Electric Co. (1954), 267 P. 2d 709, 25 Labor Cases 68317 (Wash. Sup. Ct.), affirmed judgment of Superior Court of Benton County, granting time and one-half compensation for lunch periods for guards who were on on-call status during lunch period of thirty minutes.

Mills v. Joshua Hendy Corporation (1947), 79 F. Supp. 709, On Appeal, 169 F. 2d 898, 8 WH Cases 266.

Seneca Coal & Coke Company v. Lofton (1943), 2 WH Cases 669, Affirmed 136 F. 2d 359, 3 WH Cases 358.

NOTE: A night watchman compensated during lunch period during which he could not leave his place of employment but was required to remain at his work, defendant company receiving the benefit of his presence as a night watchman during the lunch period.

Skidmore v. Swift & Company (1944), 323 U.S. 134, 65 Supp Ct. 161, 89 L.Ed. 124.

Tennessee Coal, Iron and Railroad Company v. Muscoda Local (1944), 321 U.S. 590, 64 Sup. Ct. 698, 88 L.Ed. 949, 4 WH Cases 293, Also 152 ALR 1014.

NOTE: This was the original Portal-to-Portal case and is cited in support of the general proposition of compensability of incidental activities of employees.

Thompson v. F. W. Stock & Sons, Inc. (1950), 93 F. Supp. 213, 9 WH Cases 585, Aff'd. (1952) 194 F. 2d 493.

NOTE: Compensation allowed engineer who, during lunch period, was required to watch for safe and efficient operation of machine.

U.S. v. Ewald Iron Co. (1946), 67 F. Supp. 67, 6 WH Cases 227.

NOTE: This is a criminal prosecution under the Fair Labor Standards Act in which the defendant was acquitted because it was not shown that his actions were willful. The Court did find the employees entitled to pay for lunch time.

U. S. Cartridge Co. v. Powell (1950), 185 F. 2d 67, 9 WH Cases 611 (1951), 186 F. 2d 611, 10 WH Cases, 78, where it was modified on other grounds.

NOTE: In this case the company gave its employees a pamphlet stating that the lunch period would be compensable and no deduction made therefor.

Walling v. Dunbar Transfer and Storage, Inc. (1943), 3 WH Cases 284 (U.S.D.C. W.D. Tenn.).

NOTE: Drivers of motor trucks compensated for time spent waiting at customers' premises and for lunch period, during all of which they were responsible for their truck and the cargo, could not stop or leave the truck for personal purposes and where circumstances required the drivers to eat their lunches while driving or waiting at customers' places of business.

II. Cases Disallowing Compensation

Connell v. Delaware Aircraft Industries (1947), 7 WH Cases 182 (Del. Superior Ct.).

NOTE: A Delaware case in which a company expediter claimed one-half hour pay per day eating time when away from home on company business. The Court held that the meal time was no different from the meal time at home.

Darr v. Mutual Insurance Company (1947), 74 F. Supp. 80, 6 WH Cases, 931, Affirmed (1948), 169 F. 2d 262, 8 WH Cases 124.

NOTE: This case is not precisely in point but in the course of the discussion it likened rest periods to lunch time which had not been compensable.

Devine v. Joshua Hendy Corp. (1948), 77 F. Supp. 893, 7 WH Cases 936.

NOTE: This case formed basis for denial of compensation in *Tully v. Joshua Hendy Corp., supra,* where contract between employer and collective bargaining agent specifically denied compensation therefor.

Farrell v. Simons, Inc. (1944), 4 WH Cases 876, (U.S.D.C. Minn.).

NOTE: Employee not compensated for lunch period where he could go out for lunch.

Fox v. Summitt King Mines (1943), 48 F. Supp. 952, 4 WH Cases 581, on Appeal 143 F. 2d 926.

NOTE: A mine case where miners were relieved of duty during lunch period but ate in the mines.

Schnapp v. Grocers' Terminal Warehouse (1947), 7 WH Cases 52 (U.S.D.C. N.D. Ill.).

NOTE: Lunch time compensation disallowed a watchman who was relieved of all duties and not required to remain on the premises.

Sunshine Mining Company v. Carber (1941), 41 F. Supp. 60, 1 WH Cases 753.

NOTE: Another mine case where the workers were relieved of their duties and had their lunches under ground, near the place of their work. Sometimes some of them worked a portion of the lunch period for which they received credit if they placed same on their time cards.

Thomas v. Peerless Carbon Company (1945), 62 F. Supp. 154, 5 WH Cases 1058.

NOTE: This case involved employees in a carbon black plant where they were not required to stay on the premises during the lunch hour.

Tully v. Joshua Hendy Corp. (1948), 79 F. Supp. 709, 8 WH Cases 198.

NOTE: Compensation for lunch denied because collective bargaining contract specifically denied same.

FILED
MAY 4 1
HAROLD B. WILLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 866

LYLE E. HERNANDEZ, ET AL.,
Petitioners

versus

ETHYL CORPORATION,
Respondent

and

PAUL B. PORTER, ET AL.,
Petitioners

versus

ETHYL CORPORATION,
Respondent

CONSOLIDATED

On Petition for a Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN H. TUCKER, JR.
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Shreveport, Louisiana

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Counsel for Respondent

Tucker, Bronson & Martin
Taylor, Porter, Brooks, Fuller & Phillips
Of Counsel for Respondent

May 1, 1956.

Franklin Press, Inc. Baton Rouge, La.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

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LYLE E. HERNANDEZ, ET AL.,
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versus

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Petitioners

versus

ETHYL CORPORATION,
Respondent

CONSOLIDATED

On Petition for a Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana.

BRIEF FOR RESPONDENT IN OPPOSITION

May It Please the Court:

Defendant-respondent opposes the petition of plaintiffs-petitioners for a writ of certiorari to the Court of Appeal, First Circuit, State of Louisiana, and prays that it be denied for these reasons:

These cases arise under the Fair Labor Standards Act

of 1938, as amended, USC Title 29, section 201, et seq., and the Portal-to-Portal Act of 1947, USC Title 29, section 251, et seq., and present only questions of fact. The courts below have accepted this court's construction of the law and have made a factual determination only, which is not reviewable on certiorari under USC Title 28, section 1257(3); 62 Stat. 929. *Graver Tank & Mfg. Company, Inc. v. Linde Air Products Company* (1949), 336 U.S. 271.

In the *Graver* case this court made the following pertinent observations and comments:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co. 321 US 275, 88 L ed 721, 64 S Ct 593; District of Columbia v. Page, 320 US 698, 88 L ed 408, 64 S Ct 406; Williams Mfg. Co. v. United Shoe Machinery Corp. 316 US 364, 86 L ed 1537, 62 S Ct 1179; Baker v. Schofield, 243 US 114, 61 L ed 626, 630, 37 S Ct 333."

Moreover, these cases are not reviewable under Rule 19 of this Court as there is no "important" or "special" reason for granting certiorari, for the decisions in the cases are "in accord with applicable decisions of this court"—Rule 19(a).

The sole and only issue in these cases is the compensability of the lunch period of petitioners, which they contend was neither free nor uninterrupted. All other issues have passed out of the case.

The statutes furnish no criteria by which to determine what constitutes time worked, and hence compensability under the statute. This question of compensability for the lunch period should be determined from the circumstances out of which it arises. It is the facts and circumstances of the particular case which determine compensability for time worked. *Skidmore v. Swift and Co.* (1944), 323 US 134; *Armour & Co. v. Wantock* (1944), 323 US 126.[1]

The factual questions in these cases have been decided against the petitioners by all the courts by which they have been considered.

The opinions of the trial court and the appellate court which decided them are printed in full as Appendix A to the petition for writ, beginning on pages 43 and 22, respectively. They clearly demonstrate that the postulates of petitioners'

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[1] The petition for the writ, Appendix E, "List of Cases on Compensability of Lunch Period" lists these cases under the rubric "I. Cases Allowing Compensation," with a note that they established the initial test of compensability for employees on a stand-by basis (Petition, Appendix E, page 59). It also lists under the same headings *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local* (1944) 321 US 590, noting that it is cited in support of the general proposition of compensability of incidental activities of employees. (Petition, Appendix E, page 61). In the *Swift* and *Armour* cases the inactive waiting time was held to be compensable, except for the time spent in eating and sleeping, during which the employees were rarely interrupted. In the *Muscoda* case, the original Portal-to-Portal case, the decisions of the trial and intermediate appellate courts show that there was no doubt that the lunch period was not compensable. It was not an issue in the Supreme Court, although the District Court and Court of Appeals held it was not compensable. During the lunch period the miners ate their lunches underground. There, as here, their lunch period was free and uninterrupted. 40 F. Supp. 4; 135 F(2) 320; rehearing denied 137 F(2) 176; 321 U.S. 590.

argument for the relief they seek are completely without foundation.

Something of the history of the litigation between these parties is given in the opinion of the Court of Appeal (Petition for writ, Appendix, page 22, et seq.). There it appears that in an earlier case known as the *Williamson* case, this precise question was put at issue and settled by a compromise and stipulation of facts, by which

> "Plaintiffs acknowledge and recognize that plaintiffs referred to in paragraph 11 now have a free and uninterrupted lunch period of one-half (½) hour, but contend that this practice with respect to the lunch period was not established until late in 1945, prior to which time the one-half (½) lunch period was neither free nor uninterrupted. All other details of the work schedule have been recognized and admitted hereinabove to be clearly shown by the attached schedules."

The defendants had contended that this rule had been in effect much earlier and the parties compromised this dispute by stipulating as a fact that the free and uninterrupted lunch period had been established October 13, 1945. This settlement was approved by the Court on January 9, 1947, by judgment which adopted this stipulation of facts, and thereafter judgment based thereon in favor of the particular plaintiffs was signed on March 10, 1947. On the basis of these stipulations, made to set at rest the whole wage relationship between the parties, the company paid large sums under the resulting judgment (Petition for writ, Appendix A, page 39). A substantial number of the plaintiffs in the present suits were participating plaintiffs in the *Williamson* settlement.

In this case, the plaintiffs by a stipulation intended to clarify their contentions repeated in part a stipulation made in the *Williamson* case, including the above quotation, but claimed that the rule establishing a free and uninterrupted lunch period had been changed by a verbal company order on November 13, 1945. This stipulation was intended to have the effect of an amendment to the pleadings (Transcript, Vol. 1, pages 193, 200), but in the voluminous transcript of the testimony of 2,899 pages, there is not one word of evidence to prove that any such order, verbal or otherwise, had ever been given. On the other hand, many of the plaintiffs testifying under cross examination said that they knew of the order establishing the free and uninterrupted lunch period in 1945, and that they had enjoyed a free and uninterrupted lunch period since that date (Opinions, Court of Appeal and District Court). It will be seen from the opinion of the trial court that the plaintiffs contended "(a) that they were called back before completion of their lunch period; (b) that they were not permitted to sleep during their lunch period; (c) that they were not permitted to eat off the premises; (d) that during electrical storms they were required to report back to their various positions; (e) that there were no athletic activities permitted during the lunch period; and (f) that 'horse play' was not permitted." (Petition for writ, Appendix A, page 44)

The trial court decided these questions of fact against the contentions of the petitioners. The court said that it was cognizant of the decisions which hold

> "that an employee who is requested to stand by is entitled to pay for standing by; but in this case the evidence, in my opinion, does not show that the company had the

men on a stand-by basis during their lunch period." Petition for writ, Appendix A, page 47).

The Court of Appeal agreed with the court below. In the course of its unanimous opinion, the Court of Appeal said:

"The defendant has shown that as a result of the *Williamson* case it was very careful to provide a free and uninterrupted lunch period, to publicize among its employees the establishment of such a period and their absolute right to a free and uninterrupted lunch period of 30 minutes, has shown by many witnesses that they had full knowledge of this rule and definitely understood that if they should be recalled, which was only to be during a case of emergency, they were then entitled to a 30 minute additional lunch period and in default of this to time and a half. The agreed statement of facts in the *Williamson* case upon which it was settled and in which the plaintiffs therein, many of whom are plaintiffs herein, received quite a bit of money as a result thereof, plainly stated that the defendant in 1945 had established a free and uninterruped lunch period which the plaintiffs therein had enjoyed ever since. Furthermore, the defendant had shown that as a result of time studies made by experts it was unnecessary to recall an employee from his lunch period except in case of an emergency. In fact, counsel for plaintiffs argue that plaintiffs-employees were employed to stand-by and states that proof of this is the fact that they did stand by most of the time that they were on the plant premises, and, therefore, they were employed on that basis. It is true that the plaintiffs-employees did stand by a great part of the working time, but it was only during the eight hours for which they were paid. Defendant has in detail offered testimony to refute that of the plaintiffs to the effect that they were recalled for various reasons during their lunch periods on many occasions by positive testimony that on the occasions and

for the reasons given by the plaintiff for their recall during the lunch period it was absolutely unnecessary as the personnel and man power was more than sufficient to handle such situations without the recall of anyone from their lunch. The defendant has also shown that schedules were set up for its employees in the TEL area to obtain a 30 minute free and uninterrupted lunch period except in case of an emergency." (Petition for writ, Appendix A, pages 39-40)

• • •

"We thoroughly agree with the finding of fact by the District Court that the plaintiffs have failed to prove that they did not have a free and uninterrupted lunch period as defined by the authorities heretofore cited." (Petition for writ, Appendix A, page 41)

• • •

". . . The major function of plant guards and firemen is not the performance of certain specific, localized industrial duties but to be available in the event of disturbance or fire. This general function they are performing wherever they are on the plant premises even when not at the post where generally stationed. On the other hand, the employees presently before the court have certain specific production duties performed at a specific post of duty, and while much of their time may be on a 'stand-by' basis and nevertheless part of the working hours, when they are away from their post of duty another employee performs their function. While technically they may be available in the event of emergency, the record and the finding of the District Court is that in actual fact such emergencies are of rare occurrence. The remote possibility of such interruptions of the lunch period is not of such practical benefit to the employer as to be of significance as an economic factor in the utilization of the lunch period. The

> record supports the District Court's finding that during this lunch period the employees are relieved of all duties and all supervision by the employer and are free to employ it for whatever personal uses they desire, including not only eating but napping, resting, chatting, subject, of course, to the physical restrictions of the plant site and such safety rules as those prohibiting 'horse play.' It was testified that the employees could leave the plant site, although due to the extent of the premises this would not be a practical choice." (Petition for writ, Appendix A, pages 41-42)

We may formulate the facts and circumstances found by the District Court and approved by the Court of Appeal, which has jurisdiction on appeal of facts as well as law (Louisiana Constitution Article VII, Section 29), into this statement of the status of petitioners during their lunch period:

1. They have no responsibility during the lunch period, during which they are required to leave their posts of duty.

2. There are no restrictions on employees during the lunch period except those general rules of conduct dictated by statute, decency, safety and common sense, applicable equally to all persons on the plant, regardless of status or relationship.

3. Employees can leave the plant during lunch period, but some of them are required to change clothes when so doing. Due to the location and size of the plant, few choose to do so.

4. Employees may be recalled during this lunch period in unforeseen circumstances producing emergency conditions, instances of which have been extremely rare. In such instances

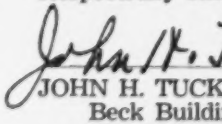
the recalled employee is given a full lunch period in substitution, or in default thereof, he is paid for time and a half overtime.

5. The manpower policy of the company based on time studies provides sufficient work force (a) to actually perform the necessary work, (b) to furnish substitutions during lunch and rest periods, (c) to take care of all foreseeable machinery failures and process difficulties at all times.

In view of these findings of fact, the postulates of the petition as the basis for the granting of a writ of certiorari in this case are without any foundation and they are not supported by the record in this case. Hence, they are clearly without merit.

WHEREFORE, respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,



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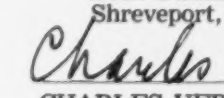
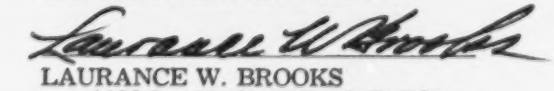


CHARLES VERNON PORTER



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Tucker, Bronson & Martin
Taylor, Porter, Brooks, Fuller & Phillips
Of Counsel for Respondent

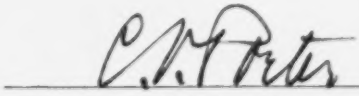
May 1, 1956.

CERTIFICATE

I, of counsel for respondent, do hereby certify that I have this day served a copy of the foregoing opposition to petition for a writ of certiorari by mailing same, postage prepaid, to counsel of record for petitioners, as follows:

DeVAN D. DAGGETT
c/o Loyola Law School
New Orleans 18, Louisiana

May 1, 1956.



Of Counsel